FOR ARGUMENT

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No. 79-394

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

L. O. WARD d/b/a L. O. WARD OIL AND GAS OPERATIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

Cases:	Page
Andresen v. *Maryland*, 427 U.S. 463	4, 13
Boteler v. *Allington*, 3 Atkyn 453	6, 13
Boyd v. *United States*, 116 U.S. 616	12, 13, 14, 16
Brown v. *Walker*, 161 U.S. 591	4, 16
Bryan v. *State*, 40 Ga. 688	12
Counselman v. *Hitchcock*, 142 U.S. 547	16
East India Co. v. *Campbell*, 1 Vesey Sr. 245	5
Fisher v. *United States*, 425 U.S. 391	6, 13
Geyger's Lessee v. *Geyger*, 2 U.S. (2 Dall.) 332	11
Harrison v. *Southcote*, 1 Atkyn 527	5, 6
C. J. Hendry Co. v. *Moore*, 318 U.S. 133	9
Kastigar v. *United States*, 406 U.S. 441	17
Lees v. *United States*, 150 U.S. 476	15
McCarthy v. *Arndstein*, 266 U.S. 34	3
Michigan v. *Tucker*, 417 U.S. 433	4
One Lot Emerald Cut Stones v. *United States*, 409 U.S. 232	15, 16
One 1958 Plymouth Sedan v. *Pennsylvania*, 380 U.S. 693	15-16
Poindexter v. *Davis*, 6 Grat. 481	12
Smith v. *Read*, 1 Atkyn 526	5, 6
The Trial of Sir Jonathan Freind, XIII State Trials 1	5
Ullmann v. *United States*, 350 U.S. 422	4, 16
United States v. *United States Coin & Currency*, 401 U.S. 715	15

Constitution and statutes: Page

United States Constitution:

Fifth Amendment ..... *passim*
Self-Incrimination Clause 2, 11, 18
Sixth Amendment 11
Act of February 25, 1868, ch. 13, 15 Stat. 37 ..... 16, 17
Act of February 11, 1893, ch. 83, 27 Stat. 443 ..... 16, 17
Federal Water Pollution Control Act, Section 311(b)(6), 33 U.S.C. 1321(b)(6) .. 1
Judiciary Act of 1789, ch. 20, Section 15, 1 Stat. 82 ..... 3, 11, 12, 14
Immunity Act of 1954, ch. 769, 68 Stat. 745 16
18 U.S.C. 6002 17

Miscellaneous:

1 Annals of Congress (Aug. 17, 1789):
434 2
753 ..... 3, 4
57 Cong. Globe 429 (1862) 17
78 Cong. Globe (1868):
950-951 17
1334 17
23 Cong. Rec. 6332-6333 (1892) 17
24 Cong. Rec. 335, 503, 708-709 (1893) .. 17
1 Elliot, *Debates on the Federal Constitution* (1836) 11
3 Elliot, *Debates on the Federal Constitution* (1836) 11

Miscellaneous—Continued Page

H.R. Rep. No. 2606, 83d Cong., 2d Sess. (1954) 17
L. Levy, *Origins of the Fifth Amendment* (1968) 2, 3, 4, 7, 8, 9, 10, 11
Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949) .. 5
II National Commission on Reform of Federal Criminal Laws, *Working Papers* (1970) 18
Note, *Applicability of Privilege Against Self-Incrimination to Legislative Investigations*, 49 Colum. L. Rev. 87 (1949) .. 4, 11
Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763 (1935) 2
S. Rep. No. 153, 83d Cong., 1st Sess. (1953) 17
Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923) 14
8 J. Wigmore, *Evidence* (McNaughton rev. 1961):
§ 2250 4
§ 2252 13
§ 2256 5
2 L. Wroth and H. Zobel, *Legal Papers of John Adams* (1965) 9, 10

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Respondent, invoking the Fifth Amendment privilege against compulsory self-incrimination, argues that he could not be compelled to be a witness against himself in the instant proceedings to assess and recover a "civil penalty" under Section 311(b)(6) of the Federal Water Pollution Control Act. So saying, he must of course overcome the plain language of the Fifth Amendment, providing that "No person * * * shall be compelled *in any criminal case* to be a wit-

ness against himself, * * *" (emphasis added). In an effort to demonstrate that the Fifth Amendment does not mean what it says, respondent has advanced an elaborate historical argument, presented for the first time in this Court, which he suggests shows that suits by the government to recover forfeitures and penalties—apparently *all* forfeitures and penalties—are within the sweep of the privilege. We address that new contention here.

1. a. The most conspicuous defect in respondent's argument based on English and Colonial materials is that all of these predate consideration and ratification of the Fifth Amendment. The Self-Incrimination Clause of that Amendment was, as respondent acknowledges (Resp. Br. 24-26), deliberately limited in its application to "criminal cases." When James Madison first proposed amendments to the Constitution, the privilege was stated in broad terms: "no person * * * shall be compelled to be a witness against himself." 1 Annals of Congress 434 (June 8, 1789). Conceivably, this language would have been broad enough to permit a defendant in a civil penalty proceeding (or, indeed, in any civil case) to decline to testify, although it is unlikely the provision was intended to have this reach.[1] But, however that may

[1] The corresponding provision in the Virginia Declaration of Human Rights, though written in similarly broad terms, was contained in Section 8 of the Declaration, which otherwise dealt with rights obtaining in criminal cases. L. Levy, *Origins of the Fifth Amendment* 405-407 (1968); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763, 787 (1935). The Virginia Declaration of Human Rights has long been recognized as a model for the Bill of Rights. Levy, *supra*, at 409. Respondent's reliance (Resp. Br. 24) on comparably broad language in the Declarations of Rights of Maryland and Delaware (the *only* two state provisions in which the right was not included in a section dealing expressly with rights obtaining in criminal cases, Levy, *supra*, at 423), is therefore misplaced. Moreover, respondent cites no authority, and we have found none, for his bald assertion that the drafters of the Maryland and Delaware Declarations intended "to make clear that the privilege applied in cases such as penalties and forfeitures, regardless of their designation as criminal or civil" (Resp. Br. 24). We would have no quarrel with this statement, of course, if respondent meant only that a defendant or a witness in a civil penalty or forfeiture action or other civil case could have asserted a privilege if his testimony would reasonably expose him to prosecution for a criminal offense. The Fifth Amendment itself protects testimony in civil cases to this extent. See, *e.g.*, *McCarthy* v. *Arndstein*, 266 U.S. 34, 40 (1924).

be, when the special committee appointed to consider Madison's proposed amendments recommended that the same language be used in describing the privilege, Rep. Lawrence of New York stated that he "thought it ought to be confined to criminal cases, and moved an amendment for that purpose; which amendment being adopted, the clause as amended was unanimously agreed to * * *."[2] 1 Annals of Congress 753

[2] As respondent points out (Resp. Br. 25), several commentators have suggested that the Fifth Amendment privilege was confined to "criminal cases" in order to avoid any possibility of conflict with Section 15 of the Judiciary Act of 1789, ch. 20, 1 Stat. 82, which provided for courts of the United States to order discovery where consistent with then-

(Aug. 17, 1789). Thus, it is clear that Congress deliberately limited the scope of the clause to "criminal cases."

b. In any event, the historical materials relied upon by respondent do not support his position. The English precedent cited by respondent (Resp. Br. 12-16) is largely irrelevant. It is now well established that the Fifth Amendment privilege was adopted in response to inquisitorial procedures of the Star Chamber and ecclesiastical courts, "which placed a premium on compelling subjects of the investigation to admit guilt from their own lips." *Andresen* v. *Maryland*, 427 U.S. 463, 470 (1976), quoting *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974). See also *Ullmann* v. *United States*, 350 U.S. 422, 428 (1956); *Brown* v. *Walker*, 161 U.S. 591, 596 (1896); L. Levy, *Origins of the Fifth Amendment* (1968) (hereinafter Levy); 8 J. Wigmore, *Evidence* § 2250 (McNaughton rev. 1961) (hereinafter Wigmore).

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prevailing rules of chancery concerning bills of discovery. See Levy, note 1, *supra*, at 425-426; Note, *Applicability of Privilege Against Self-Incrimination to Legislative Investigations*, 49 Colum. L. Rev. 87, 90-94 (1949). This suggestion is based on the statement by Rep. Lawrence, in proposing the limitation, that the language originally offered by Madison and reported by the Committee "contained a general declaration, in some degree contrary to laws passed." 1 Annals of Congress 753 (Aug. 17, 1789). The Judiciary Act had been approved by the Senate prior to the House's consideration of the Bill of Rights, although it had not actually "passed" the House or the Congress at that time.

In contrast, the English cases upon which respondent relies, with one exception,[3] all involved bills in equity in which a party to a private action at law sought to compel discovery of evidence pertaining to the lawsuit. In each, the court declined to compel discovery on the ground that the individual from whom the evidence was sought could have been required to admit facts that would have exposed him to a forfeiture or penalty. But except where the response would have clearly implicated the defendant in the commission of a crime (see *East India Co.* v. *Campbell*, 1 Vesey Sr. 245 (1749); Resp. Br. 16), these cases do not involve a privilege analogous to that of the accused in a criminal proceeding; they were instead based on the traditional maxim that equity will not aid a forfeiture. 8 Wigmore, *supra*, at § 2256; cf. Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 11 (1949). They therefore shed no light on the present question.

For example, the plaintiff in *Smith* v. *Read*, 1 Atkyn 526 (1736), and *Harrison* v. *Southcote*, 1 Atkyn 527 (1751) (see Resp. Br. 13-14), contested the defendant's title to land on the ground that the defendant had acquired land by purchase or devise

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[3] The one exception cited by respondent, *The Trial of Sir Jonathan Freind*, XIII State Trials 1 (1696), recognized the right of a witness in a prosecution for high treason to refuse to answer whether he was a Catholic or a Protestant. But in the passage quoted by respondent (Resp. Br. 13), it appears that the answer may have implicated the witness in a crime. Thus, this case is fully consistent with the accepted scope of the Fifth Amendment privilege.

from a person who had purchased it from plaintiff's ancestor in violation of an Act of Parliament prohibiting Catholics from acquiring land. The plaintiff in each case had brought a bill in equity to discover whether the person through whom defendant claimed was a "papist" at the time of purchase. The court held that the defendant was not bound to answer because "he [would be required] to discover a disability in himself; and there is no difference between a forfeiture of a thing vested, and a disability to take, inflicted as a penalty * * *." *Smith* v. *Read*, *supra*, 1 Atkyn at 527; see also *Harrison* v. *Southcote*, *supra*, 1 Atkyn at 538-539. The Fifth Amendment would not stand as a comparable barrier to discovery or testimony in a civil suit merely because it might expose a defect in a party's or witness's title to property.[4]

Likewise, in *Boteler* v. *Allington*, 3 Atkyn 453 (1746) (Resp. Br. 15), the defendant resisted discovery because to answer might have revealed that he was in violation of a law prohibiting a member of the clergy from accepting a second ecclesiastical living. The penalty for accepting a second living was to "forfeit" the first living, and the court held that the defendant could not be compelled to give responses that might result in such a forfeiture. *Id.* at 456. The opinion appears to rely on little more than the fact that adverse consequences would result if the

[4] It is also clear that one person cannot assert the Fifth Amendment privilege of another. *Fisher* v. *United States*, 425 U.S. 391, 396-401 (1976).

individual responded—a privilege far beyond that embodied in the Fifth Amendment.

The English cases involving bills in equity to compel discovery therefore have little relevance to the proper construction of the constitutional privilege, which, as noted above, sprang from quite different origins in reaction to proceedings in the Star Chamber and ecclesiastical courts.

c. The American Colonial history relied upon by respondent (Resp. Br. 19-26) is no more helpful to his cause. Respondent first discusses (*id.* at 19-20) the public opposition in New York to a requirement that all persons suspected of violating a law prohibiting fur trading between Albany and Quebec take an oath that they had not engaged in such trading. Refusal to take the oath automatically convicted the individual of the *crime* of illicit trading and subjected him to a fine of $100. Levy, *supra*, at 381. This episode therefore has no bearing on the application of the privilege in cases involving a noncriminal monetary penalty.

Respondent also errs in relying (Resp. Br. 21-22) on circumstances surrounding consideration of a Massachusetts law enacted in 1754 requiring purchasers of liquor to report to the tax collector the amount spent on liquor each year. If anything, the episode reflects an understanding that the privilege was limited to criminal cases. It is not clear that the purchaser would have exposed himself to a fine or penalty of any nature merely by subscribing to the oath acknowledging liquor purchases, although the oath may

have disclosed some purchases on which taxes were not paid. Samuel Cooper, an opponent of the oath, referred to the privilege and noted that a requirement that a person clear himself of "innocent" behavior—*i.e.*, purchasing liquor—was equally pernicious. Cooper characterized the privilege as holding that "no Man is held to *convict* himself in any Affair whereof he is *accus'd*" (emphasis added), suggesting that only compulsory self-accusation of a criminal offense was protected, and said that a supporter of the practice "could a fortiori prove, that this practice is defensible in 'Criminal Cases' " (emphasis added). Levy, *supra*, at 386.

Finally, respondent relies on two celebrated instances of forfeiture of vessels or money in the Courts of Vice Admiralty. Using writs of assistance, customs officials were authorized in the mid-eighteenth century to search for contraband on vessels in American ports in violation of revenue or trade laws. The customs officials were then empowered to bring an action for penalties or forfeitures in the Courts of Vice Admiralty, which followed civil, not common law. The cases were initiated by accusation or information, not indictment; there was no right to a jury trial, as there was in common law courts; and examination of witnesses could be conducted in secret. See generally Levy, *supra*, at 395. Indeed, these actions were often brought in the Courts of Vice Admiralty, rather than in the common law courts having concurrent jurisdiction over them, in order "to have access to a forum not controlled by the obstinate resistance of American juries" to the Navigation Acts.

See *C. J. Hendry Co.* v. *Moore*, 318 U.S. 133, 141 (1943).

In one of the incidents upon which respondent relies, a ship belonging to Henry Laurens of South Carolina was seized for technical violations of the law. As part of the proceedings, the court required the searcher of the port to take an oath of calumny that he was not maliciously motivated in seizing the ship, thereby insulating the searcher from liability to Laurens in any damage action for seizing the vessel without probable cause. In publicly denouncing proceedings in the Court of Vice Admiralty, Laurens and his supporters appeared to confuse the oath of calumny with compelled self-incrimination. In any event, the presiding judge in the Vice Admiralty Court replied to Laurens' charges that the procedure was in violation of the privilege by noting that the privilege in question applied where a person must "accuse himself criminally," and this was not, the judge said, a criminal case. Levy, *supra*, at 395-397.

Similarly, John Hancock's vessel *Liberty* was seized, condemned, and forfeited, and an action, *Sewall* v. *Hancock*, was brought *in personam* against Hancock in the Court of Vice Admiralty in Boston for forfeiture of money in three times the amount of goods forfeited. John Adams argued that suits for penalties and forfeitures in such courts violated the English constitution because these cases should be tried in open court before juries with open examination of all concerned. See generally 2 L. Wroth and H. Zobel, *Legal Papers of John Adams* 172-210 (1965). There was, as respondent points out (Resp.

Br. 23), published opposition to the "Star Chamber Proceedings" of the Vice Admiralty Court because of the inquisitorial method of examining citizens in private in hopes that evidence supporting the charges could be found. Levy, *supra*, at 397-398. But there is no indication in *Sewall* v. *Hancock*, as there was none in the Laurens case, that any witness was forced to testify in a manner that would have exposed him to forfeiture. *Id.* at 398. Thus, while the episodes reflect a decided opposition to the secret procedures utilized in forfeiture proceedings in the Courts of Vice Admiralty (which proceedings were perceived as highly penal in character, *Wroth and Zobel*, *supra*, at 188 n.62, 197-198), they shed little light on the scope of the privilege later incorporated in the Fifth Amendment.

d. It is against this background that the Congress expressly limited the Fifth Amendment privilege to "criminal cases." Because the history cited by respondent prior to ratification does not reflect an accepted recognition of the privilege (as opposed to equitable rules of discovery) going beyond a right to refuse to testify where the result would be to expose the individual to criminal liability, there is simply no basis for respondent's unsupported assertion that "by leaving the wording 'criminal' in the self-incrimination clause, * * * the protection would still extend to fines and forfeitures, regardless of their characterization by the legislature" (Resp. Br. 25-26). To the contrary, the inference can only be that Congress meant what it said. It did, after all, use the term "criminal prosecution" in describing the

cases in which an accused is entitled to the various procedural protections afforded by the Sixth Amendment, and there is no reason to believe that Congress intended the word "criminal" to have different meanings in the two amendments.[5]

It is particularly instructive in this regard that Congress separately addressed the very concerns reflected in the English discovery cases cited by respondent when it enacted the Judiciary Act of 1789. This was, of course, during the First Congress, when the Bill of Rights was considered and proposed to the States. Section 15 of the Judiciary Act, ch. 20, 1 Stat. 82, provided that all courts of the United States shall have the power in the trial of actions at law "to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, *in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery*; * * *" (emphasis added). The purpose of this provision was to avoid the necessity for a party in a civil suit to file a separate bill in equity to compel discovery. *Geyger's Lessee* v. *Geyger*, 2 U.S. (2 Dall.) 332, 333 (Cir. Ct. Pa. 1795). The emphasized

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[5] The various state conventions assembled to ratify the Constitution that recommended adoption of an amendment similar to that later included in the Self-Incrimination Clause all expressly limited their concern to persons accused or suspected of a crime. See, *e.g.*, 1 Elliot, *Debates on the Federal Constitution* 328 (New York) (2d ed. 1836); 3 Elliot, *Debates on the Federal Constitution* 447-448, 481-482, 658 (Virginia) (1836); see Levy, *supra*, at 420-421; Note, note 2, *supra*, 49 Colum. L. Rev. at 90-91.

phrase in Section 15 incorporated the various rules of chancery pertaining to bills of discovery, presumably including that denying compelled discovery which might tend to convict a party or forfeit his property. *Boyd* v. *United States*, 116 U.S. 616, 631 (1886). There is no reason to believe, however, that when Congress proposed the Fifth Amendment to the Constitution in response to fears of quite different origin regarding the criminal process, it *sub silentio* constitutionalized the rules of chancery existing at the time of ratification in civil disputes between private parties.

2. Respondent has not demonstrated on the basis of post-ratification precedent that the Fifth Amendment was intended to embody all aspects of the maxim that equity will not aid a forfeiture or penalty. He does cite (Resp. Br. 26-31) a number of state cases in which witnesses were excused from testifying on the ground that their testimony might subject them to a "penalty" or "forfeiture" in addition to possible criminal liability. But these cases were based on non-constitutional rules of evidence derived from the equitable maxim just stated (see, *e.g.*, *Poindexter* v. *Davis*, 6 Grat. 481, 490 (Va. 1850) (Resp. Br. 28); *Bryan* v. *State*, 40 Ga. 688, 689 (Ga. 1870) (Resp. Br. 29)); none relied on the privilege against self-incrimination contained in the Fifth Amendment or comparable provisions in the respective state constitutions.

Moreover, Wigmore notes that, prior to 1868, the privilege had been mentioned in only 15 reported federal cases, *and in none was the Constitution re-*

ferred to. 8 Wigmore, *supra*, § 2252, at 325. Wigmore suggests that the absence of litigation on the scope of the constitutional privilege probably resulted from the fact that until the end of the nineteenth century, a criminal defendant was not permitted to testify because of his interest in the case and the "question of the application of the narrow constitutional clause [therefore] never arose. The broader protection—of witnesses, and in civil cases—was given during the first years of this nation solely on the basis of well-established common law, without reference to constitutions" (*id.* at 324-325).

Thus, when the Court considered the scope of the Fifth Amendment privilege in *Boyd* v. *United States*, *supra*, the case upon which respondent principally relies (Resp. Br. 32-34), it wrote on a relatively clean slate. The decision in *Boyd* is written in sweeping language, and "[s]everal of *Boyd's* express or implicit declarations have not stood the test of time." *Fisher* v. *United States*, *supra*, 425 U.S. at 407. See generally, *id.* at 407-414; *Andresen* v. *Maryland*, *supra*, 427 U.S. at 471-473. But despite the broad language of the opinion generally, the precise holding of the Court on the question whether the Fifth Amendment privilege applied in the particular forfeiture proceeding before it was that "proceedings instituted for the purpose of declaring the forfeiture of a man's property, *by reason of offences committed by him*, though they may be civil in form, are in their nature criminal" for purposes of the Fifth Amendment privilege. 116 U.S. at 634 (emphasis added). The Court was careful to point out that the forfeiture

was, like the provision for imprisonment or fine for violation of the statute, one of the "penalties affixed to the criminal acts." 116 U.S. at 634. Thus, although there may be some question whether the Court in *Boyd* correctly extended the Fifth Amendment privilege to a forfeiture proceeding that was not actually a "criminal case," the Court's decision is nonetheless rooted in that deliberately limiting phrase of the Amendment because the opinion stresses that liability for a forfeiture under the statute involved was dependent on the commission of an underlying criminal offense.

Respondent also errs in relying (Resp. Br. 33-34) on the *Boyd* Court's discussion of Section 15 of the Judiciary Act of 1789, which permitted courts of the United States to compel discovery under circumstances where discovery might be compelled under ordinary rules of proceedings in chancery. See 116 U.S. at 630-632; pages 11-12, *supra*. The Court reasoned that the views of the first Congress on the question of compelling a person to produce evidence against himself could be "inferred" from what the Court termed this "remarkable" Section 15. 116 U.S. at 630-631. But there was nothing in the least remarkable about Section 15 or its incorporation of rules of chancery. Cf. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 95-96 (1923). Congress simply mandated that established discovery procedures be followed, but without the necessity of filing a separate bill in equity. Thus, although Section 15 certainly does reflect the views of the first Congress with respect to the production of documents in civil law suits, we must conclude that the Court was mistaken if it meant to suggest that a congressional intent to constitutionalize all aspects of the rules of chancery pertaining to penalties and forfeitures could likewise be "inferred" from Section 15. Indeed as noted above (see note 2, *supra*), several commentators have stated that the proposed privilege was amended on the House floor to restrict it to "criminal cases" for the very purpose of preventing any overlap with Section 15 of the Judiciary Act.

Subsequent decisions by this Court, relied upon by respondent (Resp. Br. 34-39, 43-45), have confined the holding in *Boyd* to forfeiture or penalty proceedings that were dependent on the commission of an underlying criminal offense. In *Lees* v. *United States*, 150 U.S. 476, 479-480 (1893), the Court noted that the statutory penalty involved could have been recovered in either a criminal or civil action and stressed that it was intended as punishment, thereby underscoring a nexus to a criminal offense. In *United States* v. *United States Coin & Currency*, 401 U.S. 715, 721-722 (1971), the Court stressed that the particular forfeiture under the internal revenue laws before the Court could be imposed "only upon those who are significantly involved in a criminal enterprise." The Court reiterated this reading of *Boyd*, as limited to situations in which the forfeiture is dependent on commission of a criminal offense, in *One*

Lot Emerald Cut Stones v. *United States*, 409 U.S. 232, 236, n.6 (1972).[6] See generally Pet. Br. 47-52. There is, accordingly, no occasion to import respondent's novel construction of the phrase "criminal case" into the Fifth Amendment at this late date.[7]

[6] *One Lot Emerald Cut Stones* also demonstrates the error in respondent's reliance on *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965), for the proposition that the holding of the Court in *Boyd* regarding the application of the Fourth Amendment extends to all forfeiture proceedings. As the Court pointed out in *One Lot Emerald Cut Stones*, the Court's decision in *One 1958 Plymouth Sedan* "dealt with a forfeiture that could not be had without a 'determination that the criminal law has been violated'" (409 U.S. at 236 n.6, quoting 380 U.S. at 701).

[7] A number of immunity statutes considered by the Court over the years provided that evidence produced by a party pursuant to court order could not be used against him in any criminal prosecution or for imposition of a penalty or forfeiture. See, *e.g.*, *Boyd* v. *United States*, *supra*, 116 U.S. at 632 (Act of February 25, 1868, ch. 13, 15 Stat. 37); *Brown* v. *Walker*, 161 U.S. 591, 593-594 (1896) (Act of February 11, 1893, ch. 83, 27 Stat. 443); *Counselman* v. *Hitchcock*, 142 U.S. 547, 560 (1892) (Act of February 25, 1868); *Ullmann* v. *United States*, 350 U.S. 422, 423-424 (1956) (Immunity Act of 1954, ch. 769, 68 Stat. 745). Aside from the opinion in *Boyd*, which held that the immunity provision in the Act of February 25, 1868, had been superseded with respect to the case before it by a statute that did not provide immunity from use of evidence to enforce a penalty or forfeiture (116 U.S. at 632-633), the other decisions did not directly discuss the constitutional significance of this immunity from penalties and forfeitures. But cf. *Counselman* v. *Hitchcock*, *supra*, 142 U.S. at 564 (suggesting that immunity need extend in actions against a person or his property only "in a criminal proceeding").

However, it does not appear that the original extension of immunity to enforcement of penalties or forfeitures in these statutes necessarily stemmed from constitutional concerns. It might be expected, for example, that Congress would import into these immunity statutes an immunity as broad as necessary to meet the usual rule that discovery would not be compelled where a forfeiture or penalty might result. Indeed, the common law principle derived from the rules of chancery was invoked during the debates in support of the Act of February 25, 1868, and no reference was made to the constitutional privilege. See 78 Cong. Globe 950-951, 1334 (1868). The brief debates on the Act of February 11, 1893, contain no discussion of the forfeiture and penalty language. 23 Cong. Rec. 6332-6333 (1892); 24 Cong. Rec. 335, 503, 708-709 (1893). The reports on the Immunity Act of 1954 are also unilluminating. S. Rep. No. 153, 83d Cong., 1st Sess. (1953); H.R. Rep. No. 2606, 83d Cong., 2d Sess. (1954). It is also of note that Congress soon narrowed the scope of the first immunity statute, Act of February 5, 1857, ch. 19, 11 Stat. 156, providing immunity for witnesses before congressional committees from criminal prosecution or penalties or forfeitures, to provide immunity only from the use of evidence in criminal proceedings. Act of January 24, 1862, ch. 11, 12 Stat. 333. This was intended to correspond to the constitutional privilege. 57 Cong. Globe 429 (1862) (remarks of Rep. Sumner).

The general immunity statute enacted in 1970, 18 U.S.C. 6002, does not contain an immunity for enforcement of penalties and forfeitures. This provision was based on "a comprehensive study of immunity and the relevant decisions of this Court, prepared for the Commission by Prof. Robert G. Dixon, Jr., * * * and transmitted to the President with the recommendations of the [National Commission on Reform of Federal Criminal Laws]." *Kastigar* v. *United States*, 406 U.S. 441, 452 n.36 (1972). Prof. Dixon noted that the phrase "penalty or forfeiture" does not appear in the Fifth Amendment and that its derivation in immunity statutes was unclear. He recommended deleting it from immunity statutes, and including merely the constitutional language "criminal case," leaving to case-by-case adjudication whether a particular for-

3. Respondent's argument (Resp. Br. 40-43, 46-70) that the "civil penalty" in the present case is in fact

"criminal" for purposes of the Self-Incrimination Clause, even if *all* forfeitures and penalties are not embraced by that Clause, is fully discussed in our opening brief, and will not be separately addressed here.

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

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Solicitor General

FEBRUARY 1980

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feiture or penalty was within the ambit of Fifth Amendment protection. However, if broader language was thought necessary, he suggested the statute provide that a person granted immunity shall not be "prosecuted or subjected to any *criminal* penalty or *criminal* forfeiture." II National Commission on Reform of Federal Criminal Laws, *Working Papers* 1414-1416, 1432-1433 (1970) (emphasis added). The latter formulation was not adopted, but it reflects a reading of *Boyd* that is fully consistent with our position herein.

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